(23,604)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 134.

JAY FOX, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 18, 1914.

No one went rubbernecking to see which suit a person wore who sought the purifying waters of the bay. Surely it was nobody's business. All were sufficiently pure minded to see no vulgarity, no suggestion of anything vile or indecent in the thought or the sight of nature's masterpiece uncovered.

But eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom. They had four persons arrested on the charge of "indecent exposure." One woman, the mother of two small children, was sent to jail. The one man arrested will also serve a term in prison. And the perpetrators
3 of this vile action wonder why they are being boycotted.

The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy. But the foolish people who came to live among us only because they found they could take advantage of our co-operation and buy goods cheaper here than elsewhere, have found they got into a hornet's nest. Two of the stores have refused to trade with them and the members avoid them in every way. To be sure not all have been brought to see the importance of the situation. But the propaganda of those who do will go on, and the matter of avoiding these enemies in our midst will be punished in the end.

The lines will be drawn and those who profess to believe in freedom will be put to the test of practice. There is no possible grounds on which a libertarian can escape taking part in this effort to protect the freedom of Home. There is no half way. Those who refuse to aid the defense *is* aiding the other side. For those who want liberty and will not fight for it are parasites and do not deserve freedom. Those who are indifferent to the invasion, who can see an innocent woman torn from the side of her children and packed off to jail and are not moved to action, cannot be counted among the rebels of authority. Their place is with the enemy.

The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people.

This subject will receive further consideration in future
4 numbers.

J. F."

which said printed matter then and there tended to encourage and advocate disrespect for law, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Washington.

Dated this 19th day of August A. D. 1911.

J. L. McMURRAY,
Prosecuting Attorney in and
for Pierce County, Washington,
By G. C. NOLTE, *Deputy.*

STATE OF WASHINGTON,
County of Pierce, ss:

G. C. Nolte being first duly sworn on oath says, that he is duly appointed, acting and qualified Deputy Prosecuting Attorney in and for Pierce County, Washington; that he has read the foregoing information, knows the contents thereof and believes the same to be true.

G. C. NOLTE.

Subscribed and sworn to before me this 19th day of August, A. D. 1911.

[Superior Court Seal.] J. P. PIPER,
Deputy Clerk of the Superior Court of said County and State.

Filed in Superior Court, Aug. 23, 1911. E. F. McKenzie, Clerk. By M. E. M. Deputy.

5 In the Superior Court of the State of Washington for Pierce County.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Demurrer to Information.

Comes now the defendant and demurs to the information filed herein and for grounds of demurrer says:

I.

That the said information does not state facts sufficient to constitute any offense against any law of the state of Washington.

II.

That the statute under which said prosecution is brought and under which said information is filed, is unconstitutional and void.

JAS. J. ANDERSON.
Attorney for Defendant.

Service by copy admitted this 15th day of September, 1911.

J. L. McMURRAY,
Prosecuting Attorney.

Filed in Superior Court, Sep. 13, 1911. E. F. McKenzie, Clerk. By G. F. M. Deputy.

6 In the Superior Court, Pierce County, Washington.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Order.

This matter coming on for hearing this 6th day of November, 1911, upon the demurrer of the defendant to the information in file herein, the Court having heretofore heard the arguments of counsel, and being fully advised in the premises,

It is ordered, that said demurrer be and the same is hereby overruled to which defendant excepts and his exceptions are allowed.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 128, at Page 496. Dep. No. 1 on Nov. 6, 1911. Filed in Open Court, Dept. No. 1, Nov. 6, 1911. E. F. McKenzie, Clerk, by I. C. Swett, Deputy.

7 In the Superior Court of the State of Washington for Pierce County.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Verdict.

We, the Jury in the case of State of Washington Plaintiff, vs. Jay Fox, Defendant, find the Defendant "guilty of the crime of editing printed matter tending to encourage and advocate disrespect for law" as charged in the information.

We the jury ask l-iency of the court.

Dated at Tacoma, Washington, this 12th day of Jan. 1912.

LIDA KENEWELL, *Foreman.*

Entered Jour. 128. Dept. 1. Page 557. Jan. 12, 1912. Filed in Open Court. Dept. No. 1, Jan. 12, 1912. E. F. McKenzie, Clerk. By I. C. Swett, Deputy.

8 In the Superior Court of Washington for Pierce County.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court for and order vacating and setting aside the verdict rendered in the above entitled action, and granting a new trial of said action, on the following grounds, towit:

I.

For errors of law occurring at the trial and excepted to by the defendant.

II.

Because the verdict rendered in said action is contrary to the law.

III.

Because the verdict rendered in said action is contrary to the evidence.

IV.

Because of misconduct of counsel for the state at said trial, excepted to by the defendant.

V.

Because of erroneous instructions prejudicial to the substantial rights of the defendant were given by the court to the jury at said trial.

9 VI.

Because of proper instructions requested by the defendant and refused by the court at said trial.

JAS. J. ANDERSON,
Attorney for Defendant.

Service by copy admitted this January 15th, 1912.
J. L. McMURRAY,
Prosecuting Attorney,
Attorney for Plaintiff,
By A. O. BURMEISTER, *Deputy.*

Filed in Superior Court. Jan. 15, 1912. E. F. McKenzie, Clerk.
By G. F. M., Deputy.

10 In the Superior Court, Pierce County, Washington.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Order.

This matter coming on for hearing this 3rd day of February 1912 upon the motion of defendant for a new trial, the Court being fully advised in the premises,

It is Ordered that defendant's motion for a new trial be and the same is hereby denied, to which order defendant excepts and his exceptions are allowed.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 128, at page 581. Dept. No. 1 on Feb. 3, 1912. Filed in Open Court, Dept. No. 1. Feb. 3, 1912. E. F. McKenzie, Clerk. By I. C. Swett, Deputy.

11 Be it remembered, That at a session of the Superior Court of the State of Washington, in and for the County of Pierce, Department No. 1, held at the Court House in the City of Tacoma, in said County and State, on the 6th day of February A. D. 1912, present the Hon. W. O. Chapman, Presiding Judge of such Department Robert Longmire, Sheriff, and E. F. McKenzie, Clerk, the following proceeding (inter alia) were had and done, to-wit:

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Judgment and Sentence.

Now comes the Prosecuting Attorney for Pierce County and the Defendant in this action, with counsel, into Court, said Defendant Jay Fox being brought to the bar of the Court here, is duly informed by the Court of the nature of the information filed against him in this case, for the crime of "editing printed matter tending to encourage and advocate disrespcet for law" committed on or about the 1st day of July 1911; of his arraignment and plea of "Not guilty of the offense charged in the information;" and of his trial, and the verdict of the jury rendered on the 12th day of Jan. 1912, finding him "guilty of editing printed matter tending to encourage and advocate disrespect for law."

Whereupon said Defendant is now here asked by the Court if he has any legal cause to show why judgment should not now be

pronounced against him, to which he says nothing, unless as he before has said; and no sufficient cause being shown or appearing to the Court, the judgment of the Court is now here rendered:

That, whereas, the said Defendant has been duly convicted in this Court of the crime of editing printed matter tending to en-
12 courage and advocate disrespect for law, it is thereupon, now here, Ordered, Adjudged and Decreed that the said Defendant Jay Fox is guilty of the crime of editing printed matter tending to encourage and advocate disrespect for law and that he be punished therefor by confinement in the Pierce County Jail for a term of two (2) months.

W. O. CHAPMAN, *Judge.*

Entered Jour. 128, Dept. 1, Page 584. Feb. 6, 1912.

The State of Washington to the Sheriff of Pierce County, State of Washington, Greeting:

Whereas, Jay Fox has been duly convicted in the Superior Court of the State of Washington, for the County of Pierce, of the crime of editing printed matter tending to encourage and advocate disrespect for law and judgment has been pronounced against him that he be punished therefor by confinement in the Pierce County Jail for a term of two (2) months, all of which appears to us of record, a certified copy of said judgment being indorsed hereon and made a part hereof;

Now, this is to command you, the said Sheriff, or the keeper of the County Jail of Pierce County, Washington, to take and safely keep the said Jay Fox until discharged according to law, and these presents shall be your authority for the same, herein fail not.

Witness, the Honorable W. O. Chapman, Judge of the said Superior Court, and the seal thereof, this 6th day of February A. D. 1912.

13 [Superior Court Seal.]

E. F. McKENZIE,
County Clerk and Clerk of the Superior Court,
By GEO. F. MURRAY, *Deputy.*

Filed in Open Court. Dept. No. 1. Feb. 6, 1912. E. F. McKenzie, Clerk. By I. C. Swett, Deputy.

14 In the Superior Court of Washington for Pierce County.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant and moves the court in arrest of judgment in this action on the following grounds towit:

I.

That the information filed in this action and upon which the defendant was tried does not state facts constituting a crime or a misdemeanor under the laws of the state of Washington.

JAS. J. ANDERSON,
Attorney for Defendant.

Service of above motion by copy admitted this February 6th, 1912.

G. C. NOLTE,
Attorney for Plaintiff.

Filed in Superior Court. Feb. 6, 1912. E. F. McKenzie, Clerk. By Piper, Deputy.

15 In the Superior Court, Pierce County, Washington.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

Order.

This cause coming on regularly to be heard this 6th day of February 1912, on motion of defendant in arrest of judgment in the action, the court being fully advised doth order that said motion be and same is hereby overruled. To which defendant excepts & exceptions is allowed.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 128, at page 584. Dept. No. 1 on Feb. 6, 1912. Filed in Open Court. Dept. No. 1. Feb. 6, 1912. E. F. McKenzie, Clerk. By I. C. Swett, Deputy.

16 In the Superior Court of Washington for Pierce County.

No. 21895.

STATE OF WASHINGTON, Plaintiff,
vs.
JAY FOX, Defendant.

To the State of Washington, plaintiff, & to J. L. McMurray, attorney for plaintiff:

Please take notice that the defendant, Jay Fox, appeals to the Supreme Court of the state of Washington, from the judgment of the Superior Court of the State of Washington for Pierce County,

rendered on the 6th day of February, 1912, by which judgment the defendant was sentenced to serve two months in the county Jail of Pierce County.

This appeal to include and take up all orders, decisions and rulings of the said Superior Court made in the said action which are adverse to the said defendant.

JAS. J. ANDERSON,
Attorney for Defendant.

Service by copy admitted this Feb. 6th, 1912.

G. C. NOLTE,
Attorney for Plaintiff.

Filed in Superior Court. Feb. 6, 1912. E. F. McKenzie, Clerk. By G. F. M., Deputy.

17 Department Two.

No. 10451.

STATE OF WASHINGTON, Respondent,
v.
JAY FOX, Appellant.

Filed Nov. 29, 1912.

The appellant was convicted upon a charge of editing printed matter tending to encourage disrespect for law. He was sentenced to a term of two months in the county jail of Pierce county. He appeals from that judgment, and assigns several errors which we shall briefly notice.

This prosecution is based upon sec. 2564, Rem. & Bal. Code, which provides as follows:

"Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or of any court or courts of justice, shall be guilty of a gross misdemeanor."

The defendant was accused of editing an article entitled "The Nude and the Prudes," which was published in "The Agitator," a small paper issued and circulated in Pierce county. Its publication appeared on July 1, 1911. The appellant apparently concedes that the article does tend to encourage disobedience and disrespect for law, for it clearly does so. But he argues that the statute is unconstitutional because it abridges the right of free speech and of the press, and also because the statute is uncertain. While the constitutions of the United States and of this state guarantee the right to freely speak, write and publish upon all subjects, it is not meant

thereby that persons may with impunity advocate disregard of law or, as said in People v. Most, 171 N. Y. 423:

18 "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution and the authority to provide for the punishment of such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society is essential to the security of freedom and the stability of the state."

This is the rule, and the statute under consideration is not repugnant to the constitutional provisions relating to freedom of speech and of the press.

The appellant also argues and cites numerous cases, to the effect that a statute creating an offense must be certain, and that, where the law is uncertain, there is no law. This is no doubt the rule. We are satisfied it has no application to the statute under consideration. The statute provides: "Every person who shall wilfully * * * edit * * * any * * * paper * * * or printed matter * * * advocating * * * the commission of any crime * * * or which shall tend to encourage disrespect for law * * * shall be guilty of a gross misdemeanor." It is argued that the phrase "or which shall tend to encourage disrespect for law" is entirely uncertain. But it has been held that a criminal statute is not void for uncertainty because it denounces acts which "tend," or are "reasonably calculated," to bring about prohibited results.

Waters-Pierce Water Co. v. Texas, 212 U. S. 86.

The act here charged is the editing of an article or printed matter tending to encourage disrespect of law or incite the commission of crime. There can be no doubt about the meaning of the article which defendant edited, or that it tended to incite the commission of crime. The article is not a criticism of the law but was calculated to, and did, incite the violation of law; and there can be no doubt that any reasonable person informed against under the law as defendant was, would immediately know the exact character of the offense with which he was charged. We think the information and the statute are definite and certain as to the elements of

19 the crime charged. The demurrer was therefore properly overruled.

It is also argued that the court erred in refusing to dismiss the action because it was not brought on for trial within sixty days after the information was filed. The information was filed on August 23, 1911. On September 13, the defendant filed a general demurrer to the information. This demurrer was noticed for hearing on the 16th day of September. The trial court apparently did not hear the argument upon the demurrer at that time. On October 25, 1911, the defendant filed a motion to dismiss, upon the ground that the action had not been brought to trial within sixty days after the information was filed. At the same time defendant filed an affidavit stating the time when the information was filed, and that a demur-

rer had been filed thereto and noticed for hearing upon a day fixed by the rules for such hearing; that it had been carried upon the motion calendar and had not been heard, and that the defendant had at all times been ready to argue the demurrer. The affidavit further stated that other parties charged with crime, upon informations which were filed subsequent to the date of the information against the defendant, had been brought to trial. The trial court denied this motion, and recited in the order denying the same that "good cause existed for not bringing said cause on for trial within sixty days after the filing of the information, inasmuch as defendant requested more time to present arguments on the demurrer interposed by defendant to the information herein than the court had at its disposal." Thereafter on November 6, 1911, the demurrer was heard and overruled. The statute provides that, if a defendant whose trial has not been postponed upon his own application be not brought to trial within sixty days after information filed, the court shall order it to be dismissed unless good cause to the contrary be shown. Rem. & Bal. Code, sec. 2312. It is apparent from the record that the delay was caused by the defendant. He had filed a demurrer to the information and, when the demurrer came on for hearing, his counsel required more time to present his argument upon the demurrer than the court had at its disposal. The arguments and the trial were for that reason delayed, for the accommodation of the defendant if not upon his own application. This was a sufficient reason for denying the motion.

Complaint is also made that the court erred in receiving certain evidence, to the effect that there were more prosecutions for indecent exposure after the publication of the article than there were before that time. It is claimed that the records of the justice of the peace were the best evidence of that fact, and that such evidence was improper and prejudicial. This evidence was not prejudicial because, when the editing and publication of the article were proved or admitted, it was the duty of the court to instruct the jury as a matter of law what the effect of the article was. That was a question of law and not of fact. It clearly upon its face incited the commission of crime and disrespect of law relating to indecent exposure of the person, and whether it did so as a matter of fact was therefore not prejudicial. Any other rule would require proof that an article advocating the commission of crime had actually incited persons to commit a crime, before a conviction could be had for the publication of such articles.

There is no error in the record and the judgment is therefore affirmed.

MOUNT, *C. J.*

We concur:

MORRIS, *J.*
MAIN, *J.*
ELLIS, *J.*
FULLERTON, *J.*

22 In the Supreme Court of the State of Washington.

Number 10451. Department 2.

THE STATE OF WASHINGTON, Respondent,
v.
JAY FOX, Appellant.

To the Honorable Judges of the above entitled Court:

Comes now the appellant, Jay Fox, by his attorney, and respectfully presents this his petition for a rehearing of the appeal in the said action before the above entitled court and further petitions that your honors, upon a rehearing and a reconsideration of this case upon its merits and upon the law applicable to the case, will recede from the decision handed down by this Court on the 29th day of November last.

With this idea in view we desire first to call the attention of your Honors to a patent incongruity between the offense with which the appellant is charged in the information and the offense of which your Honors appear to hold him guilty. It will be observed that the statute under which this prosecution is brought: (Sec. 2564 R. & B. Code) provides for two separate and distinct offenses. We quote as follows:

"Every person who shall willfully, print, publish, edit, issue or knowingly circulate, sell, distribute or display any book, paper, document or written or printed matter in any form, advocating, encouraging or inciting, or having a tendency to incite, the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or of any court or courts of Justice, shall be guilty of gross misdemeanor."

It is plain to be seen that two distinct offenses are here created, one being the inciting or encouraging of the commission of a crime, an overt, physical act—and the other being the encouraging or advocating disrespect for law—a mere mental condition in-

23 volving no physical action whatever. Certainly one of these offenses does not necessarily include the other. A man may have the highest respect for law and at the same time encourage and incite a violation of that same law even to the extent of encouraging and inciting the commission of a crime. Who can say what exigencies might arise that would cause a man who respects the law to encourage and incite a violation of that same law. On the other hand, a man may have the utmost disrespect for a particular law or for law in general and at the same time give the most implicit obedience to those same laws, even though his expressions may have a tendency to advocate or encourage in others a disrespect for those same laws; that is to say, to encourage in others a certain mental condition wholly disconnected with any physical act whatever.

The respondent was not charged with editing any matter "advocating, encouraging or inciting the commission of any crime, breach of the peace or act of violence," or anything having a ten-

dency in that direction. Therefore it necessarily follows that he was not tried for that offense. This clearly appears from the information itself, as in fact it appears from the statement contained in the first three lines of the opinion handed down by the Court in this case. He was charged with "editing printed matter tending to advocate and encourage disrespect for law," and he was tried for that offense and for that offense only.

Referring to the opinion handed down by this Court, which appears in Washington Decisions, Vol. 29 Number 4, we find on pages 132 and 133 the following:

"The act here charged is the editing of an article or printed matter tending to encourage disrespect for law or incite the commission of a crime. There can be no doubt about the meaning of the article which the defendant edited, or that it tended to incite the commission of a crime."

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Thus it appears that the Court, in making up the said opinion, has inadvertently enlarged upon the information, and has based the opinion upon the assumption that the defendant was charged with having incited the commission of a crime, and that it was upon that theory that the judgment of the lower court was sustained, whereas he was not charged with having incited the commission of a crime. Immediately following the above quoted language the following appears on page 133.

"The article is not a criticism of the law, but was calculated to and did incite the violation of law."

If the article is not a criticism of the law, then we respectfully submit that it could not have a tendency to encourage or advocate disrespect for law (which was the only offense with which the appellant was charged) and the judgment of the lower Court should have been reversed. Even should we admit for the purposes of this argument, that the said article did have a tendency to incite or encourage the commission of a crime, that fact would not justify a conviction under the allegations of the information. Believing this view to be correct we contend that it is wholly immaterial whether the said article incited or encouraged the commission of a crime or not. It seems clear to the appellant from the foregoing that he was informed against for one offense and was convicted of an entirely separate and distinct offense.

In the opinion handed down by this Court the case of Waters-Pierce Oil Company v. Texas (212 U. S. 86) is cited in support of the holding that a law which denounces certain acts which "tend," or are "reasonably calculated" to bring about certain prohibited results, is not void for uncertainty, and it appears that a conviction under such a statute was sustained by the Supreme Court of the United States. However, we think that a wide distinction is to be drawn between that case and the case at bar. In the

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Waters-Pierce Case it appears clearly that there was on the the part of the defendant an intent to bring about the prohibited results, and in deciding the said case Mr. Justice Day quotes with approval the language of the same Court in Swift & Co. v. the United States (186 U. S. 175) where the Court says:

"Where acts are not sufficient in themselves to produce results which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Com. v. Peaslee, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequence dangerous probability exists, this statute, like many others and like the common law in some cases directs itself against the dangerous probability as well as against the completed result."

From this it would seem that in order to convict in a case of this character it is not only necessary that the prohibited act should have the prohibited tendency, but that also there should have been on the part of the defendant, an intent that it should have such tendency. In the case at bar there is no allegation of such intent in the information, neither is there the slightest evidence of such intent. If, as appellant contends, intent is necessary in a prosecution of this kind then the judgment of the lower Court should be reversed. As a matter of fact the element of intent was eliminated by the trial Court's instructions to the jury.

Counsel for appellant hopes that he is not exceeding the bounds of propriety in calling attention to the fact that in thousands of instances the law in question has been openly violated with entire impunity, no attention being paid to such violation by the prosecuting officers, and that such open violations occur almost daily. It is a matter of daily occurrence that articles having a most decided tendency to advocate and encourage a disrespect for laws are published. Such things are probably necessary to that freedom of the press which has ever been considered one of the safeguards of our national institutions. And while it is not claimed, that from
26 a legal standpoint, the common violation of a law gives license for further violations, yet we submit that such conditions furnish good grounds for viewing a case of this kind with the utmost leniency and liberality.

While it is true that the penalty imposed upon the defendant in this case would not usually be considered a very great severity, yet the constitutional principle involved renders the case one of vast importance. In view of the fact that the appellant's briefs were largely based upon the Federal questions involved, counsel for appellant expresses regret that the Court, in passing upon the case, did not more specifically pass upon the several Federal questions. In the event that this Court should see fit to grant a re-hearing as prayed in this petition, it is hoped that this court will more specifically pass upon the said Federal questions in view of a possible submission of said case to the Supreme Court of the United States.

All of which is most respectfully submitted.

(Signed) JAS. J. ANDERSON,
Attorney for Appellant.

Back: 69. Wash. Dec. Vol. 29, p. 131. No. 10,451. State v. Fox. Petition for rehearing. Supreme Court, Department two. Filed Dec. 28, 1912. C. S. Reinhart, Clerk, F. Denied Feb. 7, 1913. Jas. F. Anderson, Att'y for appellant, 1116 Nat. Bank B'ld'g, Tacoma, Wash.

27 In the Supreme Court of the State of Washington.

SATURDAY, February 8, 1913.

In the Matter of the Petitions for Rehearing in the Following-Entitled Cases:

Blinn v. Grindle	No.	10569	Order
First National Bank v. City of Seattle et al	"	10646	"
Gust v. Gust	"	10552	"
Quinn et al. v. Roelefs	"	10539	"
Jones v. Francis et al	"	10372	"
Lemar et al. v. Anderson	"	10652	"
Miller v. Gust	"	10577	"
Pacific Drug Company v. Hamilton	"	10490	"
Perlus v. Silver	"	10641	"
State ex rel. Murphy v. Coleman	"	10500	"
" " " Wells v. Dykeman	"	10829	"
" " " Sargent v. Superior Ct. King	"	10877	"
In re Rec-Spokane-Columbia Riv. R. R. & Nav. Co	"	10085	"
Smith v. Quinault Lbr. Co	"	10219	"
State v. Drummond	"	10224	"
Eilers Music House v. Oriental Co	"	10259	"
M. A. Maher & Co. v. Farnandis	"	10260	"
Dill v. Carver	"	10282	"
Seattle, Renton & So. Ry. Co. v. City of Seattle	"	10344	"
In re Estate Wm. Conn Bell	"	10362	"
Thurston et al. v. Cohn et al	"	10366	"
In re Needham etc	"	10385	"
Clark et al. v. City of Seattle	"	10429	"
State v. Fox	"	10451	"
Turlock Fruit Juice Co. v. Pac. & Puget Sd. B. Co.	"	10462	"
Kleeb v. McInturff	"	10471	"
Akers et al. v. Lord et al	"	9914	"
Olsen v. Northern Steamship Co	"	9981	"

The petitions for rehearing in the above entitled cases having been heretofore submitted to the court, and the court having fully considered the same, and being fully advised in the premises, it is now by the court ordered that the said petitions be and the same are hereby denied.

28 In the Supreme Court of the State of Washington, Monday, February 10, 1913.

No. 10451.

THE STATE OF WASHINGTON, Respondent,
vs.
JAY FOX, Appellant.

Judgment.

This cause having been heretofore submitted to the court, upon the transcript of the record of the superior court of Pierce county, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 10th day of February, A. D. 1913, on motion of J. L. McMurray, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be, and the same is, hereby affirmed with costs; the petition for rehearing denied, and that the said State of Washington have and recover of and from the said Jay Fox the costs of this action taxed and allowed at thirty-four & 50/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

29 In the Supreme Court of Washington.

THE STATE OF WASHINGTON, Respondent,
vs.
JAS FOX, Appellant.

Petition For Writ of Error.

To the Hon. Herman D. Crow, Chief Justice of the above named court:

Now comes Jay Fox, appellant and plaintiff in error, by Jas. J. Anderson, his attorney, and says that on the 12th day of January, 1912, he was convicted of a gross misdemeanor in the Superior Court of Washington for Pierce County, and pursuant to said conviction he was on the 6th day of February, 1912, sentenced to sixty days imprisonment in the county jail of said Pierce county, and to pay the costs of said action. That he duly prosecuted his appeal to the Supreme Court of the State of Washington to review the said judgment and sentence and conviction of the said Superior Court, and that subsequently and on or about the 29th day of November, 1912, the said Supreme Court sustained and affirmed the said judgment and conviction of said Superior Court. That the said Supreme Court is the court of last resort for all causes in the State of Washington, and that Hon. Herman D. Crow is the Chief Justice of the said Supreme Court.

That said appellant and plaintiff in error says that in said final judgment of said Supreme Court of Washington, and in the proceedings prior thereto in this cause certain errors were committed to the prejudice of said plaintiff in error which will appear more in detail from the assignments of error which are filed herewith and made a part of this petition.

Wherefore, your petitioner prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the Supreme Court of the State of Washington and the Superior Court of the State of Washington for Pierce county, for the cor-
30 rection of said errors and the reversal of the said judgment complained of.

That the transcript of the records and all papers in the case, duly authenticated, may be sent to the Supreme Court of the United States, and that the said writ of error operate as a supersedeas, and that the amount of security, if any, that the petitioner herein may give and furnish on said writ of error may be fixed, and that all further proceedings in said courts of the state of Washington be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States.

(Signed) JAY FOX,
Plaintiff in Error.
JAS. J. ANDERSON,
Attorney for Plaintiff in Error.

The Writ of Error as prayed for in the (foregoing) petition is hereby allowed with an order of supersedeas staying the enforcement of the judgment mentioned therein until the Plaintiff in Error can be heard in the Supreme Court of the United States, upon execution of a bond by the said Plaintiff in Error with proper security in the sum of $1000.

Dated this 10 day of February, 1913.

(Signed) HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

31 In the Supreme Court of Washington, Department No. 2.

THE STATE OF WASHINGTON, Respondent,
v.
JAY FOX, Appellant.

Assignment of Errors.

Now comes Jay Fox, plaintiff in error, above named as appellant, and files herewith his petition for writ of error and says, that there are errors in the records and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments of error and submits that in the records and proceedings and

final judgment and decision of the said Supreme Court of the State of Washington, the court of last resort in all causes in said state, there is manifest error in this, to-wit:

The court erred in holding Section 2564 of Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, under which the said defendant and appellant was convicted as aforesaid, valid. The validity of said statute was denied and drawn in question by the plaintiff in error herein on the ground that it violates the following provisions of the Constitution of the United States, to-wit:

Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law. Also Article 6 of the Amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him. Also Article 1 of Amendments to the Constitution of the United States, providing that no law shall be passed abridging the freedom of speech or of the press. Also Article 5 of Amendments to the Constitution of the United States which provides that no person shall be deprived of life, liberty or property without due process of law. Also Section 9 of Article 1 of the Constitution of the United States, which provides that no ex post facto law shall be
32 passed.

Second: The court erred in instructing the jury that "The state need not prove that the defendant possessed a criminal intent in editing the printed matter set out in the information or any part thereof. The question for your consideration is, was the editing of the article in question or any part thereof, wilful on the part of the defendant, and unlawful, and did it tend to encourage or advocate disrespect for law," which said charge violated the 14th Amendment to the Constitution of the United States and the privileges and immunities of the plaintiff in error thereunder.

Third: The Supreme Court of the State of Washington erred in finding the defendant and plaintiff in error herein, guilty of editing printed matter that "tended to incite the commission of a crime," whereas the said defendant and plaintiff in error was not charged with editing printed matter that tended to incite the commission of a crime. Therefore said holding and finding of the said Supreme Court of Washington was without due process of law and was in violation of the 5th and 14th Amendments to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law.

Fourth: The said Supreme Court of the State of Washington erred in affirming and sustaining the judgment of the trial court in said action, for the reason that the proceedings in the trial court in said action were wholly unconstitutional and void, being in violation of the following parts of the Constitution of the United States, to-wit: Section 9 of Article 1; and Article 1, Article V, Article 6 and Article 14 of the Amendments to the Constitution of the United States.

Because of the foregoing errors the said Jay Fox, plaintiff in error, prays that the judgment and decision of the Supreme Court of the State of Washington, as aforesaid, be reversed, and that judgment be entered in favor of said plaintiff in error herein.

(Signed) JAS. J. ANDERSON,
Attorney for Jay Fox,
Plaintiff in Error.

33 Back: No. 10,451. State of Washington, plaintiff, v. Jay Fox, Defendant. Petition for Writ of Error. Filed Feb. 10th 1913. C. S. Rinehart, Clerk. Jas. J. Anderson, Attorney for Jay Fox, plaintiff in error. 1116 National Realty Bldg., Tacoma, Washington.

34 In the Supreme Court of the State of Washington, Monday, February 10, 1913.

No. 10451.

STATE OF WASHINGTON, Respondent,
vs.
JAY FOX, Appellant.

Order Granting Writ of Error.

The writ of error as prayed for in the petition is hereby allowed with an order of supersedeas staying the enforcement of the judgment mentioned therein until the plaintiff in error can be heard in the supreme court of the United States upon execution of a bond by the said plaintiff in error with proper security in the sum of $1000.

Dated this 10 day of February, 1913.

HERMAN D. CROW,
Chief Justice of the Supreme Court
of the State of Washington.

35 In the Supreme Court of Washington.

No. —.

THE STATE OF WASHINGTON, Plaintiff,
v.
JAY FOX, Defendant.

I, Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain action heretofore pending in the Supreme Court of the State of Washington, wherein the State of Washington was plaintiff and Jay Fox was defendant, that the

said Jay Fox now plaintiff in error, claimed certain rights, privileges and immunities under and by virtue of the Constitution of the State of Washington and the Constitution of the United States, and that the decision of the said Supreme Court of the State of Washington, being the highest court for the trial of all causes in said State of Washington, was against the rights, privileges and immunities so claimed by the said Jay Fox, now plaintiff in error, that is to say, that the said Jay Fox, as appears by the records in the above named action, claimed that a certain statute of the said State of Washington, being Section 2564 of Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, under which said statute the said Jay Fox was prosecuted and convicted of a gross misdemeanor in said action, was and is unconstitutional and void, and that the same was and is violative of Article Fourteen of the Amendments to the Constitution of the United States, also violative of Article Six of Amendments to said Constitution of the United States, also violative of Article one of said amendments to said Constitution; also that the proceedings and conviction in
36 said action were and are in violation of the rights and immunities of said Jay Fox under the Fourteenth Amendment to said Constitution, also under Section Nine of Article One of same, also under the Fifth Amendment to same.

And I therefore certify that the said Jay Fox, plaintiff in error, is entitled to have the said action and the final judgment of the Supreme Court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States.

Witness the Hon. Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington, this 10th day of February, 1913.

(Signed) HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

Back: 10451. Filed Feb. 10, 1913. C. S. Rinehart, Clerk.

37 *Bond.*

Know all men by these presents, that we, Jay Fox, as principal and the National Surety Company of New York as surety, are held and firmly bound unto the state of Washington in the penal sum of one thousand dollars ($1,000.00) for the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors or administrators, firmly by these presents.

Witness our hands and seals at Tacoma, Washington, this 11th day of February, 1913.

The condition of the above obligation is such that whereas the above bounden principal, Jay Fox, was convicted in the Superior Court of Washington for Pierce county of a certain gross misdemeanor, and whereas, the said conviction in said court was duly affirmed by the Supreme Court of the State of Washington, and whereas, the said Jay Fox has sued out in the proper court a writ of Error for the review of said conviction in the Supreme Court of

the United States, Now therefore, if the said Jay Fox shall prosecute his said writ of error to said Supreme Court of the United States with effect, and shall attend the said Supreme Court of the State of Washington or said Superior Court when required so to do, and shall abide the final decision in said action, and obey the final order and mandate of said courts, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) JAY FOX. [SEAL.]
NATIONAL SURETY CO.
(Signed) CLARENCE C. OPIE, [SEAL.]
Attorney-in-Fact.

This bond approved and to operate as a supersedeas.
(Signed) HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

Back: Bond, Jay Fox, in favor of State of Washington. Filed Feb. 19, 1913. C. S. Reinhart, Clerk. F.

38 Supreme Court of the State of Washington, Department No. 2.

THE STATE OF WASHINGTON, Respondent,
against
JAY FOX.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the said judgment which is in the said Supreme Court of the State of Washington, being the highest court of law and equity in said state in which a decision could be had in the said suit between Jay Fox, plaintiff in error and the said State of Washington, wherein was drawn in question the validity of the Statute of the said State of Washington, to-wit, Section 2564 of Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, on the ground of its being repugnant to the constitution and laws of the United States, and the decision was in favor of such validity. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given that then
39 under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the records and proceedings aforesaid, being inspected, the said

Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 11th day of February, A. D. 1913.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington,
By E. C. ELLINGTON,
Deputy Clerk.

40 [Endorsed:] 10451. No. —. In the Supreme Court of the United States. The State of Washington, Respondent, vs. Jay Fox. Writ of Error. Filed Feb. 19, 1913. C. D. Reinhart, Clerk. F.

41 In the Supreme Court of Washington.

THE STATE OF WASHINGTON, Defendant in Error,
vs.
JAY FOX, Plaintiff in Error.

Waiver of Citation.

The defendant in error above named hereby acknowledges notice of issuance of Writ of Error in the above entitled proceeding and of the return day thereof, and hereby waives citation in said proceeding and service thereof.

Dated at Tacoma, Washington, this March 5th, 1913.

LORENZO DOW,
Successor to J. L. McMurray as Prosecuting Attorney of Pierce County, Washington, and ex-Officio Attorney for Defendant in Error.

42 In the Supreme Court of Washington.

STATE OF WASHINGTON, Respondent and Defendant in Error,
vs.
JAY FOX, Appellant and Plaintiff in Error.

Præcipe.

To the Clerk of the above named Court:

Please prepare the following names portions of the record in the above entitled action for transmission to the supreme court of the United States upon writ of error heretofore sued out in said action:

Information.
Demurrer to information.
Order overruling demurrer.
Verdict.
Motion for new trial.
Order overruling motion for new trial.
Motion in arrest of judgment.
Order overruling motion in arrest of judgment.
Judgment and sentence.
Motion of appeal.
Opinion of the Supreme Court.
Motion for rehearing in Supreme Court.
Order denying rehearing.
Remittitur.
Petition for Writ of Error.
Order allowing Writ of Error.
Writ of Error.
Assignment of Errors.
Certificate of Chief Justice of Supreme Court of Washington
Bond.

Very truly yours,

JAS. J. ANDERSON,
Attorney for Jay Fox, Plaintiff in Error.

Service of above by copy admitted this March 3rd, 1913.

LORENZO DOW,
Successor to J. L. McMurray as Prosecuting Attorney for Pierce County and ex-Officio Attorney for Defendant in Error.

43 In the Supreme Court of the State of Washington.

No. 10451.

STATE OF WASHINGTON, Respondent and Defendant in Error,
v.
JAY FOX, Appellant and Plaintiff in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of so much of the record in the above entitled cause as I am required to certify to the United States Supreme Court, as per the praecipe herewith; and I herewith transmit said transcript, together with the original Writ of Error and the original Waiver of Citation, to said Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Washington at Olympia this 7th day of March, 1913.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 11th day of February, A. D. 1913.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington,
By E. C. ELLINGTON,
Deputy Clerk.

40 [Endorsed:] 10451. No. —. In the Supreme Court of the United States. The State of Washington, Respondent, vs. Jay Fox. Writ of Error. Filed Feb. 19, 1913. C. D. Reinhart, Clerk. F.

41 In the Supreme Court of Washington.

THE STATE OF WASHINGTON, Defendant in Error,
vs.
JAY FOX, Plaintiff in Error.

Waiver of Citation.

The defendant in error above named hereby acknowledges notice of issuance of Writ of Error in the above entitled proceeding and of the return day thereof, and hereby waives citation in said proceeding and service thereof.

Dated at Tacoma, Washington, this March 5th, 1913.

LORENZO DOW,
Successor to J. L. McMurray as Prosecuting Attorney of Pierce County, Washington, and ex-Officio Attorney for Defendant in Error.

42 In the Supreme Court of Washington.

STATE OF WASHINGTON, Respondent and Defendant in Error,
vs.
JAY FOX, Appellant and Plaintiff in Error.

Præcipe.

To the Clerk of the above named Court:

Please prepare the following names portions of the record in the above entitled action for transmission to the supreme court of the United States upon writ of error heretofore sued out in said action:

Information.
Demurrer to information.
Order overruling demurrer.
Verdict.
Motion for new trial.
Order overruling motion for new trial.
Motion in arrest of judgment.
Order overruling motion in arrest of judgment.
Judgment and sentence.
Motion of appeal.
Opinion of the Supreme Court.
Motion for rehearing in Supreme Court.
Order denying rehearing.
Remittitur.
Petition for Writ of Error.
Order allowing Writ of Error.
Writ of Error.
Assignment of Errors.
Certificate of Chief Justice of Supreme Court of Washington Bond.

Very truly yours,

JAS. J. ANDERSON,
Attorney for Jay Fox, Plaintiff in Error.

Service of above by copy admitted this March 3rd, 1913.

LORENZO DOW,
Successor to J. L. McMurray as Prosecuting Attorney for Pierce County and ex-Officio Attorney for Defendant in Error.

43 In the Supreme Court of the State of Washington.

No. 10451.

STATE OF WASHINGTON, Respondent and Defendant in Error,
v.
JAY FOX, Appellant and Plaintiff in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of so much of the record in the above entitled cause as I am required to certify to the United States Supreme Court, as per the precipe herewith; and I herewith transmit said transcript, together with the original Writ of Error and the original Waiver of Citation, to said Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Washington at Olympia this 7th day of March, 1913.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

44 Supreme Court of the United States, October Term, 1913.

No. 491.

STATE OF WASHINGTON, Defendant in Error,
against
JAY FOX, Plaintiff in Error.

It is hereby stipulated between the undersigned, Prosecuting Attorney of Pierce County, State of Washington, and Attorney for the Defendant in Error, and the undersigned, Attorney for the Plaintiff in Error, that the copy of the intructions of the Court to the jury upon the trial of this cause in the Superior Court of Pierce County, State of Washington, and which formed part of the record on appeal to the Supreme Court of the State of Washington, and which were heretofore duly certified by C. S. Reinhard, Clerk of the Supreme Court of Washington, and by him duly transmitted to the Clerk of the Supreme Court of the United States at Washington, D. C. in or about the month of March, 1913, and which are now in the possession of the said Clerk, may now be filed and made part of the record in this cause in the Supreme Court of the United States, the same as if said copy of said instructions had been sent up originally with the record upon the return thereof by the said Clerk of the Supreme Court of Washington to the said Supreme Court of the United States, and that this stipulation may be filed and treated by the Clerk of this Court as sufficient authority for making said instructions, certified as aforesaid, a part of the record and return in this cause.

Dated, April 18th, 1913.

GILBERT E. ROE,
Attorney for Plaintiff-in-Error,
55 Liberty Street, New York City.
LORENZO DOW,
Prosecuting Attorney of Pierce Co., State of Washington, and Attorney for Defendant-in-Error.

S. WARBURTON,
Of Counsel for Def. in Error.

45 [Endorsed:] 491/23604. Supreme Court of the United States. State of Washington, Defendant in Error against Jay Fox, Plaintiff in Error Stipulation. Gilbert E. Roe, Attorney for Plaintiff in Error. 55 Liberty Street, Borough of Manhattan, City of New York.

46 In the Supreme Court of the State of Washington.

No. 10451.

STATE OF WASHINGTON, Plaintiff,
v.
JAY FOX, Defendant.

Supplemental Transcript.

47 January 11th, 1912.

Court met pursuant to adjournment at 1:30 o'clock.

The testimony being closed, both parties having rested, the court read his instructions to the jury as follows:

Ladies and Gentlemen of the Jury: This is an action wherein the defendant, Jay Fox, is accused of the crime of editing printed matter tending to encourage and advocate disrespect for law. The information is lengthy and includes in it a purported copy of certain printed matter which it is charged the defendant, Jay Fox, in the county of Pierce, in the state of Washington, on or about the first day of July, 1911, then and there did then and there unlawfully and wilfully edit, which said printed matter then and there tended to encourage and advocate disrespect for law, contrary to the form of the statute in such cases made and provided, and against the pease and dignity of the state of Washington.

The article referred to has been introduced in evidence and the questions for your determination are: first, whether Jay Fox at the time and place alleged did unlawfully and wilfully edit the printed matter set forth in the information and secondly, the court will submit to you the question whether or not said printed matter then and there tended to encourage and advocate disrespect for law.

2.

To the information filed in this case the defendant has entered his plea of not guilty, and this plea raises every issue in this trial and it therefore devolved upon the state to prove to your satisfaction beyond a reasonable doubt every material element of the crime with which the accused stands charged.

3.

The defendant is presumed in law to be innocent until he is proven guilty, and the burden of proving him guilty rests upon the state. Before you can find him guilty you must find from the evidence beyond a reasonable doubt every element and fact necessary to constitute such offense.

48 4.

This presumption of innocence is not a matter of form merely, which you may disregard at pleasure, but it is a part of the law

of the land and is a substantial right guaranteed by that law to every person accused of crime; it is your duty in this case to bear this rule of law in mind in considering the question of the defendant's guilt or innocence; this presumption continues with the defendant throughout all the stages of the trial and until the case has been finally submitted to the jury and the jury find this presumption has been overcome by the prosecution beyond a reasonable doubt.

5.

By the term "reasonable doubt" is meant such a doubt, either arising from the evidence or lack of evidence as a reasonable man would reasonably entertain. A doubt to justify acquittal must be reasonable and it must arise from a candid and impartial investigation of all the evidence. If after considering all the evidence in the case you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt and should convict; if you have not such conviction you should acquit.

6.

The court instructs the jury that under the constitution of this state every person may freely speak, write and publish upon all subjects being responsible for the abuse of that right. Liberty of speech and of the press is guaranteed by the supreme law of the land, and will be zealously guarded, preserved and enforced by the courts. This provision of our statute was designed to secure the rights of the people and of the press for the public good. Individuals are free to talk, and the press is at liberty to publish; they are, however, answerable and responsible for the abuse of that right; this privilege of freely speaking and writing upon all subjects is the right to publish with impunity, truth with good motives and for justifiable ends, whether it respects governments or individuals; the right to publish freely whatever the citizen may please and
49 be protected from any responsibility for so doing, except in so far as such publications from their blasphemy, obscenity or scandalous character may be a public offense or as by their falsehood and malice they may injuriously affect the standing and reputation or pecuniary interests of individuals. It is not intended by the freedom of the press that the press should be the lawful vehicle of malicious defamation or as an engine for evil and designing men to cherish for malicious purposes, sedition, irreligion and impurity; it does consist in the right to publish with impunity, truth, with good motives and for justifiable ends, whether it respects government magistracy or individuals, and implies not only liberty to publish, but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character, when tested by such standards as the law affords.

7.

Under the laws of this state every person who shall wilfully print, publish, edit, institute or knowingly circulate, sell, distribute or dis-

play any book, paper, document or written or printed matter in any form, advocating, encouraging or inciting or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law shall be guilty of a gross misdemeanor. It is under this provision of our statute that the information is filed charging the defendant with having unlawfully and wilfully edited certain printed matter which tended to encourage and advocate disrespect for law.

8.

Before you can find the defendant guilty you must believe from the evidence in this case that the printed matter was unlawfully and wilfully edited by the defendant, Jay Fox, and further, if you find that the defendant so edited it, you must believe from the evidence in this case that the printed matter shown to have been edited by the defendant does have a tendency to encourage and advocate disrespect for law. Unless you believe from the evidence that such printed matter does have a tendency to encourage and advocate disrespect for law you should find the defendant not guilty.

50

9.

"Disrespect for law" means a lack of respect for law, as meant by the word law; not necessarily some particular law, unless it be of such a character that disrespect for it imputes a disrespect for law generally as promulgated for the good order of society and protection of the public peace for the establishment of government.

10.

I instruct you that the State need not prove that the defendant possessed a criminal intent in editing the printed matter set out in the information, or any part thereof. The question for your consideration is: Was the editing of the article in question, or any part thereof, wilful on the part of the defendant, and unlawful, and did it tend to encourage or advocate disrespect for law.

11.

"Wilful" means purposely and intentionally, with a design and hope to accomplish the evil result. It means a set purpose and intention to do the exact thing the law says shall not be done.

12.

I further instruct you that where one does an act with intent, which the law forbids, it is no defense and it will not avail him, that the act was done by him with intent to produce what he might consider an ultimate good.

13.

Nude bathing is not in itself a violation of law, but nude bathing becomes a violation of law only when accompanied by indecent exposure of the person, and although you may believe from the evidence that the defendant, Jay Fox, edited the printed matter set out in the information and although you may believe that said printed matter is a defense of nude bathing, that fact alone and in itself would not justify you in finding the defendant guilty,
51 unless you find that it advocated nude bathing under circumstances amounting to indecent exposure of the person and that the article published was in advocacy of the right to bathe under conditions violating the laws of decency or respecting the indecent exposure of the person so as to and that it did tend by its tenor and effect to encourage or advocate a disrespect for law.

14.

In determining the issues in this case you should carefully consider the whole evidence and all the facts admitted for your consideration by the Court, giving the several parts of the evidence such weight and effect as you think the same entitled to. You are not to consider any testimony or evidence which has been offered, and ruled out by the Court, but are to form your conclusions as to the guilt or innocence of the defendant exclusively upon evidence admitted for your consideration.

15.

In determining the weight to be given to the testimony of the several witnesses you should take into consideration their conduct and demeanor while testifying; their interest, if any, in the result of the case; their temper, feeling or bias, if any is shown; their appearance while testifying before you, and give such credit to the testimony of each witness as under all the circumstances you deem the witness entitled to.

The credibility of the witness, the force of his or her testimony, the weight you are going to attach to it, are all matters you are to determine for yourselves in making up your verdict.

16.

You are further instructed that the jury in criminal cases are not to consider or determine the punishment to be imposed upon
52 persons found guilty of crime. It is your duty to find only the guilt or innocence of the defendant; the punishment to be imposed upon a person found guilty of crime is for the Court alone to determine, under the law.

17.

You are further instructed that under the laws of this State the defendant is not compelled to be a witness, and no inference of guilt

shall arise in your minds against the accused from the failure of the defendant to testify as a witness in this case in his own behalf.

18.

Whether or not the defendant believes in anarchy is not an issue in this case and you are not to consider that question in making up your verdict. The issues in this case being, as before stated: First, whether or not the defendant Jay Fox, edited the printed matter set out in the information, and secondly, whether or not the said printed matter tends to encourage or advocate disrespect for law.

19.

Take the law as given to you by the Court, apply it to the facts as found by you, and thereupon make up your verdict.

20.

If the evidence, under the instructions of the Court as to the law of the case requires it, you may find the defendant guilty of the crime of editing printed matter tending to encourage and advocate disrespect for law, as charged in the information herein, or you may find him not guilty.

Proper forms of verdict have been prepared and will be handed to you when you retire to deliberate upon your verdict; the one you decide upon should be signed by the one of your number
53 whom you select as your foreman, and then you will return therewith into Court.

This being a criminal case it will require twelve of your number to return a verdict.

(Signed) W. O. CHAPMAN, *Judge.*

Thereupon the matter was argued to the jury by counsel for the respective parties.

54 In the Supreme Court of the State of Washington.

No. 10451.

STATE OF WASHINGTON, Plaintiff,
v.
JAY FOX, Defendant.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the Instructions of the Court in the above entitled cause, which I am required by the plaintiff in error to prepare and so certify to the United States Supreme Court as a Supplemental Transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Olympia this 24th day of March, 1913.

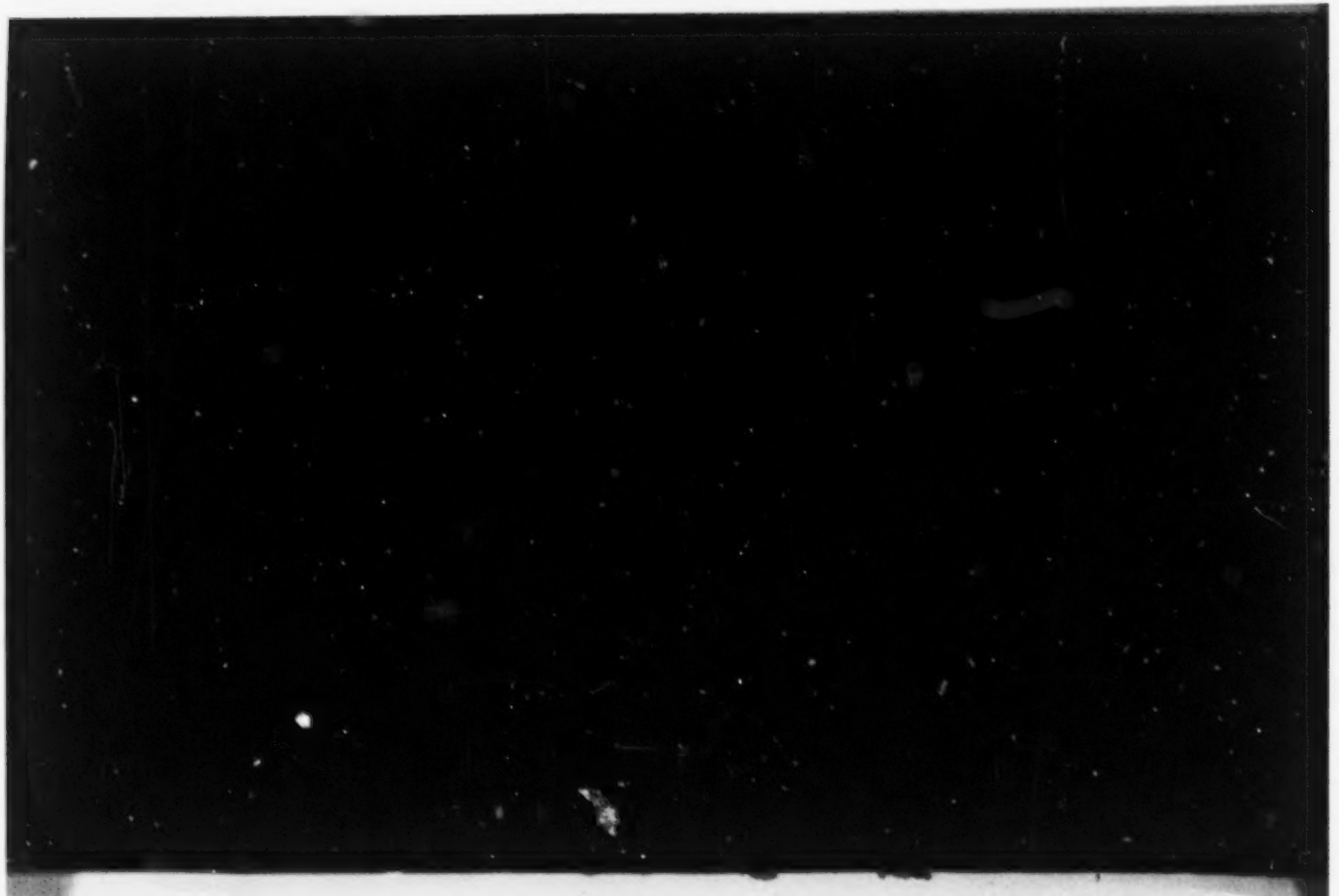
[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

55 [Endorsed:] 491/23604.

56 [Endorsed:] File No. 23,604. Supreme Court U. S., October term, 1913. Term No. 491. Jay Fox, Pl'ff in Error, vs, The State of Washington. Stipulation of counsel and addition to record. Filed October 23, 1913.

Endorsed on cover: File No. 23,604. Washington Supreme Court. Term No. 134. Jay Fox, plaintiff in error, vs. The State of Washington. Filed March 28th, 1913. File No. 23,604.



Supreme Court of the United States

JAY FOX, Plaintiff-in-Error vs. THE STATE OF WASHINGTON, Defendant-in-Error.	On Writ of Error, October Term, 1914, No. 134.

STATEMENT OF CASE.

The plaintiff-in-error was convicted after trial by jury in the Superior Court of Pierce County, State of Washington, on an Information filed by the prosecuting attorney for violation of Section 2564, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, which provides as follows:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or of any court or courts of justice, shall be guilty of a gross misdemeanor."

The Information filed by the prosecuting attorney omitting the formal parts, alleged:

> "That Jay Fox has committed the crime of editing printing matter tending to encourage and advocate disrespect

for law," and the prosecuting attorney "by this his Information accuses the said Jay Fox of the crime of editing printed matter tending to encourage and advocate disrespect for law committed as follows, to wit:

That the said Jay Fox, in the County of Pierce, in the State of Washington, on or about the 1st day of July, A. D. 1911, then and there being, did then and there unlawfully and wilfully edit printed matter in the following words, to wit:"

The Information then sets forth the printed matter in the following words:

"THE NUDE AND THE PRUDES.

Clothing was made to protect the body, not to hide it. The mind that associates impurity with the human body is itself impure. To the humanitarian, the idealist, the human body is divine, 'the dwelling place of the soul,' as the old poets sang.

To the coarse, half-civilized barbarian, steeped in a mixture of superstition and sensualism, the sight of a nude body suggests no higher thoughts, no nobler feelings than those which the sight of one animal of the lower order of creation produces in another.

The vulgar mind sees its own reflections in everything it views. Pollution cannot escape from pollution, and the polluted mind that sees its own reflection in the nude body of a fellow being and arises in early morning to enjoy the vulgar feast, and then calls on the law to punish the innocent victims whose clean bodies aroused the savage instincts, is not fit company for civilized people, and should be avoided.

These reflections are based on an unfortunate occurrence which took place recently in Home. Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society. One of the liberties enjoyed by Homeites was the privilege

to bathe in evening dress or with merely the clothes nature gave them, just as they chose.

No one went rubbernecking to see which suit a person wore who sought the purifying waters of the bay. Surely it was nobody's business. All were sufficiently pure minded to see no vulgarity, no suggestion of anything vile or indecent in the thought or the sight of nature's masterpiece uncovered.

But eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom. They had four persons arrested on the charge of 'indecent exposure.' One woman, the mother of two small children, was sent to jail. The one man arrested will also serve a term in prison. And the perpetration of this vile action wonder why they are being boycotted.

The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy. But the foolish people who came to live among us only because they found they could take advantage of our cooperation and buy goods cheaper here than elsewhere, have found they got into a hornet's nest. Two of the stores refused to trade with them and the members avoid them in every way. To be sure, not all have been brought to see the importance of the situation. But the propaganda of those who do will go on, and the matter of avoiding these enemies in our midst will be punished in the end.

The lines will be drawn and those who profess to believe in freedom will be put to the test of practice. There is no possible grounds on which a libertarian can escape taking part in the effort to protect the freedom of Home. There is no half way. Those who refuse to aid the defense *is* aiding the other side. For those who want liberty and will not fight for it are parasites and do not deserve freedom. Those who are indifferent to the invasion, who can see an

innocent woman torn from the side of her children and packed off to jail and are not moved to action, cannot be counted among the rebels of authority. Their place is with the enemy.

The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people.

This subject will receive further consideration in future numbers.

J. F."

After setting forth the foregoing the Information concludes as follows:

"Which said printed matter then and there tended to encourage and advocate disrespect for law, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Washington" (Record, pages 1 and 2).

The defendant demurred to the Information on the ground that the Information did not state facts showing the commission of a crime, and also on the ground

"that the statute under which said prosecution is brought and under which said Information is filed, is unconstitutional and void" (Record, page 3).

Defendant duly appealed to the Supreme Court of Washington (Record, pages 8 and 9), and on November 29th, 1912, the Supreme Court of the State of Washington affirmed the conviction and filed the opinion found in this record on pages 9 to 11. This opinion shows that the defendant asserted that the statute in question was obnoxious to the free speech and free press clauses of the Constitution of the United States, and also the due process of law clause of the Fourteenth Amendment (pages 9 and 10). Thereafter the Honorable Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington,

allowed the writ of error to this Court, certifying to the constitutional questions which had been raised in the Supreme Court of the State of Washington (pages 19, 20). The assignments of error in this Court are found at pages 17, 18.

Specifications of error relied upon.

The following is a specification of the errors relied upon:

1. Because the said Supreme Court of the State of Washington sustained the trial Court in holding that the statute of said State, to wit: Section 2564, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, under which said defendant was convicted, was valid and not violative of Art. 14 of the Amendments to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. (See first assignment of error, page 18.)

2. Because the said Supreme Court of the State of Washington sustained the trial Court in holding that the statute of said State, to wit: 2564, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, was valid and not violative of Art. 6 of the Amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him, and also Art. 1 of the Amendments to the Constitution of the United States, providing that no law shall be passed abridging the freedom of speech or of the press, and also the constitutional provision providing that no ex post facto law shall be passed. (See first assignment of error, page 18.)

3. Because the said Supreme Court of the State of Washington sustained and affirmed the judgment of the trial Court, and held that the proceedings in said trial Court in said action were constitutional and constituted due process of law within the meaning of the 14th Amendment to the Constitution of the United States. (See assignment of error numbered "Fourth," page 18.)

ARGUMENT.

POINT I.

The constitutional question here presented was sufficiently raised in the State Court.

As previously stated the Information was demurred to on the ground that the statute in question was "unconstitutional and void" (Record, page 3). Standing alone this might leave it uncertain whether the state or the federal constitution was invoked. But the opinion of the Supreme Court of the State of Washington leaves no doubt of the precise nature of the federal constitutional questions which were presented to and decided by that Court (see Opinion, pages 9, 11). As under the practice in the State of Washington the record was brought into the Supreme Court of the State of Washington by a simple notice of appeal without specifications of error, it is necessary to refer to the opinion to determine the constitutional questions which were presented to and decided by the State Court. In allowing the writ of error to this Court the Chief Justice of the State of Washington also certified to the constitutional questions which were presented and decided in that Court (see pages 19, 20). The record, therefore, sufficiently shows that the right now asserted under the Constitution of the United States were specifically set up and claimed by defendant in the State Court, and was decided by that Court adversely to defendant's contention.

See

Revised Statute, Section 709;

Columbia Water Power Co. vs. Columbia Elec. Light Co., 172 U. S., 475;

Tyler vs. Judges, 179 U. S., 405, 411;

Chicago, Burlington, &c., Rd. vs. Chicago, 166 U. S., 226;

Missouri Valley Land Co. vs. Wiese, 208 U. S., 234, 244;

Loeb vs. Columbia Township Trustees, 179 U. S., 472, 483;

Montana vs. Rice, 201 U. S., 291.

POINT II.

The statute in question, Section 2564 R. & B. Code, violates the Fourteenth Amendment to the Constitution of the United States because it deprives the accused of liberty and property without due process of law.

The first element of "due process of law" is that there shall be a *"law."* One of our oldest and most fundamental maxims is that "where the law is uncertain, there is no law." *Ubi jus incertum, ibi jus nullum.* Black's Law Dictionary, page 1181.

In Hodgson vs. Vermont, 168 U. S., 262, 272, it is said:

> "By the Fourteenth Amendment it is made the right and the consequent duty of this Court when a case has been duly brought before it, to inquire whether in the enactment and administration of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a State Court in pursuance of the provisions of a State statute."

The statute in the present case, omitting allegations not here material, is as follows:

> *"Every person who shall wilfully * * * edit * * * written or printed matter * * * which shall tend to encourage or advocate disrespect for law * * * shall be guilty of a gross misdemeanor."*

This is the statute and all of it. The Information simply accused the defendant in the exact language above quoted "of editing printed matter tending to encourage and advocate disrespect for law committed as follows," and the article complained of is then set forth and it is charged that the defendant did unlawfully and wilfully *edit* it. It will be observed that

the statute makes it an offense to "edit" the written or printed matter. It need not be published. The charge of the Information is that the accused edited the article in question, not that he published it or had any control over its publication. "Disrespect for law!" What law? What degree of disrespect? By what standard shall it be determined whether certain written or printed matter tends to encourage respect or disrespect for a certain law or for any law? The same argument addressed to one person may produce disrespect for law, which addressed to another would produce respect for the same law, and addressed to still another would produce no effect at all. This Information in no manner informs the accused what the law is, disrespect for which he is charged with encouraging, by editing the printed matter in question. The article begins with some rather lofty sentiments concerning purity, condemns the "vulgar mind" because of the impure thoughts incited in it by the nude body of a fellow being, and condemns those who arise "early in the morning" to spy upon nude bathers. It especially condemns the conduct of these over-curious ones who made a complaint against the nude bathers, thereby sending to jail a mother with two small children. The article then contains a plea that the members of the community boycott these busybodies who brought about the trouble. A more innocuous article upon the subject it would be difficult to compose—or "edit." If it could fairly be said that it tended to encourage disrespect for any law, it would apparently be some law against boycotting. An examination of the proceedings of the trial however, particularly of the instructions of the Court (page 28), shows that it was some law against nude bathing under circumstances which could be held to amount to indecent exposure of the person which the Court and the prosecutor had in mind. Of course, what would be held to amount to indecent exposure of the person, while bathing, depends very largely upon the local public sentiment, local statutes or ordinances, the practices of the community, and the surrounding facts and circumstances generally. We cannot know the form or substance of the statute which it is claimed defendant encouraged disrespect for, any more than the defendant could, for no clue

to it is given in the Information. But it was obviously some State statute or local ordinance and had no relation to those fundamental principles protecting life, liberty and property, necessary to the maintenance of organized government. By affirming the defendant's conviction in this case, the Supreme Court of the State of Washington has thereby given a practical construction to the word "law" used in Section 2564 of R. & B. Code, to the effect that it may mean at least a statute law of the State of Washington, which is merely intended to regulate to some extent the proprieties of life, to be observed by the inhabitants of the State. The instruction of the Court to the jury in this case was that disrespect for law meant "not *necessarily* some *particular* law," except it was of the character further described, plainly implying that it might, though not necessarily, include any other particular law. It is true we cannot be certain from this record whether the opinion of the trial Court was shared by the Supreme Court of the State of Washington, but the affirmance of the conviction of the defendant in this case is a practical construction of the law making it applicable at least to statutes and police regulations, on the subject of nude bathing.

Without attempting to exhaust the list, we here cite some of the federal and state decisions where statutes much more certain than the one here involved have been held void, as not constituting law at all within the meaning of the Fourteenth Amendment.

Louisville & N. R. Co. vs. Railroad Commission of Tennessee, 19 Fed., 679, 691;
Chicago & N. W. Ry. Co. vs. Dey, et al., Ry. Comrs., 35 Fed., 866, 876;
Tozer vs. United States, 52 Fed., 917.

In the two latter cases the opinions were written by Mr. Justice Brewer and the rule there announced has been many times affirmed by this Court, one of the latest occasions being in

Waters Pierce Oil Co. vs. Texas (No. 1), 212 U. S., 86, also 108-111.

In the last cited case while the statute was upheld, the correctness of the rule of the above cases was admitted. See also, among cases from the State Courts, the following:

Ex parte Jackson, 45 Ark., 158;
Czarra vs. Board, 25 App. Cas. (D. C.), 443;
United States vs. Capital Traction Co., 34 App. Cas. (D. C.), 592;
Hewitt vs. Board of Medical Examiners, 148 Cal., 590;
Louisville & N. R. Co. vs. Commonwealth of Kentucky, 99 Ky., 663;
Commission vs. Louisville, &c., 20 Ky. Law, 491;
Mathews vs. Murphy, 23 Ky. Law Rep., 750 (54 L. R. A., 415);
Hagerstown vs. Baltimore & O. Ry. Co., 107 Md., 178;
Mayor vs. Radecke, 49 Md., 217, 230;
Cook vs. State, 26 Ind. Ap., 278.

In Louisville & N. R. Co. vs. Railroad Commission, 19 Fed., supra, the statute of the State of Tennessee regulating railroads prohibited under severe penalties the taking of "unjust and unreasonable compensation" and also the making of "unjust and unreasonable discriminations." In the opinion (page 691) it is said:

> "But what is unjust and unreasonable compensation and unreasonable discrimination? And can an action quasi criminal be predicated thereon?"

After citing authorities to show the statute was unconstitutional, the opinion continues:

> "Questions as to what is a reasonable time for the performance of a contract or reasonable compensation for work and labor done by one man at the request of another, without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies, but the law furnishes in all such cases a *standard* of compen-

sation for the guidance of a jury. Without such legal standard there could be no reasonable approximation of uniform results; the verdicts of juries would be as variant as their prejudices and this could not be tolerated."

And, again (page 692-693), it is said:

> "We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—cannot be thus imperiled by such vague, uncertain and indefinite enactments. *The corporations and persons against whom this act is directed can do nothing under it with reasonable safety.*"

In Chicago & N. W. Ry. Co. vs. Dey, 35 Fed., supra, Mr. Justice Brewer had before him a statute which provided that if any railroad company shall charge more than "a fair and reasonable rate of toll," or make any "unjust charge," it should be subject to a criminal prosecution. In the opinion (page 876) it is said:

> "Now, the contention of the plaintiff is that the substance of these provisions is that if a railroad company charges an unreasonable rate, it shall be deemed a criminal one and punished by a fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to plaintiff's criticism, for no penal law can be sustained *unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.*"

The learned justice then quotes from the Chinese Penal Code, as follows:

> "Whoever is guilty of improper conduct and of such as is contrary to the spirit of the laws, though not a breach

> of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

And the learned justice significantly adds:

> "There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

We respectfully submit that as between the Chinese statute above quoted and that of the State of Washington under consideration the differences are all in favor of the former. That at least requires "improper conduct" before the accused can be punished, while the statute of the State of Washington is fully satisfied if the defendant without "criminal intent" (see Instruction No. 10, page 227) "edited written or printed matter" unobjectionable in every way except as it might tend to encourage "disrespect" for a law, even though it was a bad law, not entitled to respect.

In Tozer vs. United States, supra, referring to a somewhat similar statute, Mr. Justice Brewer (page 919) said:

> "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."

Rather strangely as it seems to us, the Supreme Court of the State of Washington cited the decision of this Court in the Waters Pierce Oil Company case, 212 U. S., 86, supra, as an authority to show that the law under consideration was sufficiently definite. It is true that in the Waters Pierce Oil Company case this Court (see page 111) held:

> "We are not prepared to say that there was a deprivation of due process of law, because the statute permitted, and the Court charged, that there might be a conviction

> not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

The case is, however, as we understand it, when the statute then before the Court is considered, a strong authority in our favor. It refers approvingly to the above-quoted cases, and some others, and points out that the statutes there considered were properly held unconstitutional for the reason that under such an act (statute) it rests with the jury to say whether a rate is reasonable and makes guilt depend *not upon the standards fixed by law,* but upon what a jury might think as to the reasonableness of the rate in controversy. But the Court adds:

> "The Texas statutes in question do not give the broad power to a Court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

In the case at bar, however, the statute in question does give to the jury the absolute power to determine the criminal character of the act in accordance with their belief in the merits or demerits of the law subjected to criticism.

To illustrate, the State of Washington has a law for the "recall" of various elective officers. Suppose one believing in that law advances as an argument in support of it, that it tends to make the officers subject to the recall more anxious to ascertain and comply with the will of a majority of the voters at any particular time. To those who believe that it is desirable for the public official to try to ascertain and follow the momentary popular will, as it may change from time to time upon a given subject, such argument will encourage them in their respect for the law. But to those who hold different views, such argument will inspire disrespect for the law. If one accused of encouraging disrespect for this law is tried before a jury composed of persons who favor the "recall" they must naturally find the defendant not guilty, for the argument according to their

standards, which are their own opinions, would tend to inspire respect for the law. A jury composed of individuals of opposite opinions would naturally arrive at an opposite result; but in any case the verdict would depend upon the jurors' opinions of the law the accused had discussed. What is true with regard to the "recall" law of the State of Washington is true of every other "law" to which it may be held this statute applies.

In none of the cases above noted is the statute there considered so hopelessly obnoxious to the constitutional provision as in the case at bar. The above cases usually relate to commercial transactions and involve overt acts of known and recognized tendency and effect. The word "tend," for example, in the Texas statute considered in the Waters Pierce Oil case, supra, was very properly used in that statute, because, as this Court pointed out in that case, monopoly is accomplished by many acts and transactions no one of which constitutes the completed offense, but each one of which is properly characterized as "tending" to that result. So, also, in all those cases the final result which it was sought to penalize was admittedly an offense which the law might and did properly condemn. I suppose no one will contend, however, that the existence of the mental state or attitude which may be described as "disrespect for law" is an offense. That far this legislation has not yet advanced. How then can legitimate argument against a law which tends to bring it into "disrespect" because it is shown to be a bad law, be made a criminal offense? If it is said that "law," as used in this statute, does not mean some particular law but only law used in a sense which makes it mean the same thing as organized government, the answer is that the Supreme Court of the State of Washington by its decision in this case has construed it differently. The decision of the Supreme Court of the State of Washington in this case, is a controlling authority up to the present time on the inferior courts of that State, which would require them to entertain a prosecution based upon the charge that any statute of that State had been brought into disrespect by editing written or printed matter which tended to bring it into disrespect. If this is not the view, then "law" as used in this statute may mean any law of this

country or any other. It is to be noted also that the statute in question penalizes editing written or printed matter which tends to encourage disrespect for "*any* Court." The legislative intent seems perfectly clear to prevent any discussion of any Court or law which would tend to bring either into disrespect. That free government is at an end where this law is enforced is self-evident. Of course, what has been said above disposes of that class of cases which may possibly be cited in support of the law, where it has been held that "language naturally tending to produce" a breach of the peace or assault and battery, and the like, has been held sufficiently definite. So, also, with statutes forbidding the transmission of "obscene" matter through the mails. So, also, of language which encourages or incites to unlawful violence of any sort. In such cases the object to be accomplished by the language penalized is itself unlawful, and consists of some overt act, and besides, by centuries of usage, the language of such statutes have acquired a definite and certain meaning. For example, we know that language, however coarse, vulgar or even blasphemous, is not obscene, lewd or lascivious unless it has relation to some "sexual impurity." Swearingen vs. United States, 161 U. S., 446. So, also, in the case of language described as tending to produce violence or an overt act of any kind. The character and causes of the prohibited act are known, and it is possible to determine with some degree of certainty, what language induces the commission of such act. In the case at bar, however, the mental state of the reader or hearer described as "disrespect for law" is the ultimate fact to be produced by the use of the language penalized, and who can say what language will produce that state of mind? What would be thought of a statute which penalized the use of language naturally tending to produce in the hearer or reader a desire to vote for the repeal of a law? Yet such statute would be more definite and not more tyrannical than the one we are now considering.

The cases above cited contain numerous illustrations of the principle discussed, and we forebear further quotation.

This statute is not only unconstitutional because of its uncertainty but because it deprives the defendant of the liberty

protected by the Fourteenth Amendment. In Allgeyer vs. Louisiana, 165 U. S., 578, this Court said:

> "The liberty mentioned in that amendment (the Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." and to make necessary contracts to carry the above rights into effect.

It does not matter whether the depravation of liberty or other fundamental rights result from the *arbitrary* action of a jury, a judge or any other agency of state government. This Court under the mandate of the Fourteenth Amendment, when its authority is properly invoked, must interfere to prevent the wrong. And what can be more arbitrary than the verdict of the jury in this case, finding the defendant guilty of the shadowy and uncertain offense of editing the innocent article in question and thereby tending to create a mental attitude on the part of someone which the jurors would describe as "disrespect" for some law, relating to nude bathing.

> Yick Wo vs. Hopkins, Sheriff, 118 U. S., 356;
> Dobbins vs. Los Angeles, 195 U. S., 233, 240.

See also

> Paterson vs. Colorado, 205 U. S., 454, 461.

The majority opinion in the case last cited makes it clear that whenever "innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment" by any instrumentality of state government, the Fourteenth Amendment is properly invoked. In West vs. Louisiana, 194 U. S., 258, on page 263, this Court makes it clear that the control which the State has in any and all proceedings in its courts, civil and criminal, is subject

"to the qualification, that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal constitution."

We have preserved in the record the question to what extent if at all the Fourteenth Amendment made the First and some of the others of the first ten amendments applicable to state governments. That question was raised but left undecided in Paterson vs. Colorado, supra, but in our view the Fourteenth Amendment is sufficient to give full protection to the rights of the plaintiff-in-error, which were invaded in the State Court.

We respectfully submit that the judgment of the Supreme Court of the State of Washington should be reversed with directions that defendant be discharged.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

JAY FOX, *Plaintiff in Error,* vs. STATE OF WASHINGTON, *Defendant in Error.*	On Writ of Error. No. 134.

BRIEF FOR DEFENDANT-IN-ERROR

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Attorneys for Defendant in Error.

CITY OF TACOMA.

Stanley Bell Printing Co., Tacoma

SUPREME COURT OF THE UNITED STATES

JAY FOX, *Plaintiff in Error,* vs. THE STATE OF WASHINGTON, *Defendant in Error.*	On Writ of Error, October Term, 1914, No. 134.

STATEMENT OF THE CASE.

1.

The statement of facts, as set forth in the brief filed by the plaintiff in error, is substantially correct, therefore we omit the same.

2.

The first assignment of error is that the court erred in holding Sec. 2564, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, under which the plaintiff was convicted, valid.

The contention of the plaintiff in error being that the statute is invalid, by reason of it being too uncertain, based on the rule that "where the law is uncertain, there is no law." We admit the soundness of the rule set forth, but fail to see its appli-

cability to the case at bar. In the following cases the law in question was not held void for uncertainty:

State vs. Stuth, 11 Washington 423.

Foster vs. Territory, 1st Washington, 411.

State vs. Dvoracek, 118 Northwestern, 399.

Louisville & N. R. Co. vs. Commonwealth, 46 S. W., 697.

Louisville Railway Co. vs. Commonwealth, 30 S. W., 616.

Missouri, K. & T. Ry. Co. vs. State, 97 S. W., 720.

Gustavel vs. State, 54 N. E., 123.

State vs. Hirsch, 24 N. E., 1062.

State vs. Kolsem, 130 Indiana, 434; 29 N. E., 595; 14 L. R. A., 566.

36 Cyc., 968 and 969.

12 Cyc., 141-142.

44 American Digest, title "Statutes," Section 47.

The reasons, in the foregoing cases, impelling the courts to uphold the various statutes, are that there could be no serious difference of opinion as to what the Legislature meant.

The cases cited by appellant (Brief, pages 9 and 10), in which the statutes were held void for uncertainty, are cases where the acts legislated against

required a comparison with a certain and fixed standard in order to determine whether the act was a crime or not. No standard of comparison was fixed in these cases, consequently the matter must be left to conjecture. If a schedule of maximum rates had been fixed in these cases, then, clearly, the statute would not have been void for uncertainty.

State vs. Kolsem, 130 Indiana, 434; 29 N. E., 595; 14 L. R. A., 566.

These cases cannot be held to be applicable. The term "Disrespect for the law" is not a comparative one, nor could a comparison be made which would determine whether or not the article tended to encourage and advocate disrespect for law or not. The only matter to be determined here, then, is whether or not any double meaning could be ascribed to the words "tending to encourage and advocate disrespect for law." "A criminal statute is not void for uncertainty because it denounces acts which 'tend' or are 'reasonably calculated' to bring about the prohibited results." (*Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 86; 53 Law Edition, 417-430.

It will be readily admitted that the phrase "disturbing the peace" is a term that cannot be readily defined and restricted to any one given act, yet many widely divergent acts have been found to fall within the scope of this phrase. Is the phrase "to encourage and advocate disrespect for law" any more

uncertain, or vague, because it cannot be defined and restricted to one particular act?

The word "encourage" has a well-defined meaning (Vol. 3, Words and Phrases, 2385) as has also the word "advocate." In the case of *State vs. Stuth*, 11 Washington, 423, the word "disturb" was held to have a well-known legal significance. Certainly the words "encourage" and "advocate" are no more difficult of comprehension than the word "disturb." Can the words "disrespect for law" be held to be vague, indefinite and uncertain? Is it difficult to ascertain what the Legislature meant by the use of these words?

We have been able to find no rule applied to legislative enactments which would require a detailed description of the act which would constitute "disrespect for law." Such an enactment would be as unlimited as the human imagination.

"But a penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited; it is sufficient if the intention is expressed in ordinary language without technical accuracy."

12 Cyc., 142.

The fact that different juries might reach different conclusions on the same statement of facts, as urged by appellant in his brief, page 14, would not

of necessity vitiate the statute, for that condition is possible with every case that was ever tried.

The reasonableness or unreasonableness, the wisdom or unwisdom of a statute are not matters for judicial investigation. The question being whether the Legislature used that degree of certainty in defining the prohibited act which would enable anyone of ordinary understanding to know the evil intended to be prohibited.

We believe this rule has been followed and that the act in question is not void for uncertainty.

Plaintiff in error also contends that the statute in question violates the provisions of Article 1 of the Amendments to the Constitution of the United States providing that no law shall be passed abridging the freedom of speech or of the press.

In the case of the *People vs. Most*, 171 N. Y., 423; 64 N. E., 175; 58 L. R. A., 509, a statute somewhat similar to the one in the instant case was under consideration. It was urged there that the constitutional guaranty of freedom of speech, which is identical with our own constitutional provision upon the subject, was infringed upon. The Court said:

"While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and the authority to provide for the punishment of such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, in-

duce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control, and the courts may punish the licentiousness of the press."

See also

8 Cyc., p. 892.

Cooper vs. People, 13 Col., 373; 22 Pac., 790.

In Re Banks, 56 Kansas, 242.

Hart vs. People, 26 Hun., 396.

State vs. Sykes, 28 Conn., 225.

Vol. 10, Cen. Dig., 1500, Sec. 172.

Counsel for the plaintiff in error, on page 8, in referring to the article in question, says: "The article begins with some rather lofty sentiments concerning purity, * * * condemns the conduct of the over-curious ones who made a complaint against the nude bathers." And goes on to say: "That a more innocuous article upon the subject would be difficult to compose." The article did begin with a lofty appeal, to what purpose? Let us see what this appeal was; it begins: "Clothing was made to protect the body, not to hide it. The mind that associates impurity with the human body is itself impure," etc. Now, passing on to the next thought in the article, the writer alludes to their intolerance and hatred of order and restraint of any

kind by saying: "Home is a community of 'free spirits,' who came out into the woods to escape the polluted atmosphere of priest-ridden conventional society. One of the liberties enjoyed by Homeites was the privilege to bathe in evening dress, or with simply the clothes which nature gave them, just as they chose."

And goes on to emphasize the fact that these "free spirits" dispensed with decency and all conventionality, by saying: "All were sufficiently pure-minded to see no vulgarity, nor suggestion of anything vile or indecent in the thought or sight of nature's masterpiece uncovered."

After mentioning the fact that some of these "free spirits" had been arrested for "indecent exposure" of themselves, he says: That "the well-merited indignation of the people has been aroused. Their liberty attacked." What liberty? Why, the liberty to wear clothes, or not, as their "free spirit" inclination might warrant, or direct.

Now, let us see what is the object of the article, with the lofty sentiments as expressed in the above paragraph. The writer makes a direct appeal and a direct attempt to incite and coerce the members of the colony to "action" against the law-abiding portion of the colony by exhortation, yes, by threats, by saying that the lines will be drawn, and those who profess to believe in freedom will be put to the test of practice. "There is no possible ground on which the libertarian can escape taking part in the effort

to protect the freedom of Home. There is no halfway. Those who refuse to aid the defenders are aiding the other side. For those who want liberty and will not fight for it are parasites and do not deserve freedom * * * their place is with the enemy." (Meaning, evidently, the law-abiding portion of the colony.)

The article in question, with all the facts and conditions in this matter, were before the trial court and jury; they had every opportunity to determine whether in their judgment the article was one that would "tend to encourage and advocate disrespect for law," or whether it was, as counsel for the plaintiff in error contends, a mere innocuous article on nudity.

There is a marked tendency throughout this entire country towards creating disrespect for law and courts. Criticism of law and higher tribunals is heard upon every hand, no matter what the ruling happens to be. Every occasion is quickly seized, not for fair and decent criticism, but that they may dip their quill in gall and wormwood and impugn the motives and malign the character of the object of their attacks. The statute in question is a law which welcomes fair and reasonable cricitism; but it is aimed at such appeals and declarations against our commonwealth as are found throughout this entire article; which counsel for plaintiff in error so stoutly maintains contains no venom, nor disrespect for the law and courts of our commonwealth.

In conclusion, we respectfully submit that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

W. V. TANNER,

Attorney General of the State of Washington.

FRED G. REMANN,

Prosecuting Attorney for Pierce County, State of Washington.

FOX v. STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 134. Submitted January 19, 1915.—Decided February 23, 1915.

Where the highest court of the State, in overruling a demurrer, affirmed that the Constitution of the United States guaranteed freedom of speech, but held the statute on which the indictment was based valid in that respect and also that it was not bad for uncertainty, citing cases decided by this court as authority, this court may gather that rights under the Federal Constitution were relied on apart from the certificate of the state court to that effect, and there is jurisdiction under § 237, Judicial Code, to review the judgment.

The statute of the State of Washington, Rem. & Bal. Code, § 2564, denouncing the wilful printing, circulation, etc., of matter advocating or encouraging the commission of any crime or breach of the peace or which shall tend to encourage or advocate disrespect for law or any court or courts of justice, *held* not to be unconstitutional as the same has been construed by the highest court of that State and applied in the case of one indicted for publishing an article encouraging and inciting that which the jury found was a breach of state laws against indecent exposure.

Statutes should be construed, so far as they fairly may be, in such a way as to avoid doubtful constitutional questions; and this court presumes that state laws will be so construed by state courts.

If the statute attacked should be construed as going no further than it is necessary to go in order to decide the particular case involved within it, it cannot be condemned for want of definiteness.

Laws of the description of the statute of Washington involved in this action and prohibiting encouragement of crime, are not unfamiliar.

This court has nothing to do with the wisdom of the defendant, the prosecution, or the act. It is concerned only with the question whether the statute and its application infringes the Federal Constitution.

71 Washington, 185, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of

a statute of the State of Washington preventing the wilful printing and circulation of written matter having tendency to encourage or advocate disrespect for the law, are stated in the opinion.

Mr. Gilbert E. Roe for plaintiff in error:

The constitutional question here presented was sufficiently raised in the state court.

Rev. Stat., § 709; *Columbia Power Co.* v. *Columbia Light Co.*, 172 U. S. 475; *Tyler* v. *Judges*, 179 U. S. 405, 411; *Chi., B. &c. R. R.* v. *Chicago*, 166 U. S. 226; *Missouri Valley Co.* v. *Wiese*, 208 U. S. 234, 244; *Loeb* v. *Columbia Township*, 179 U. S. 472, 483; *Montana* v. *Rice*, 204 U. S. 291.

Section 2564 violates the Fourteenth Amendment because it deprives the accused of liberty and property without due process of law. Black's Law Dictionary, p. 1181; *Hodgson* v. *Vermont*, 168 U. S. 262, 272.

For Federal and state decisions where statutes much more certain than the one here involved have been held void, as not constituting law at all within the meaning of the Fourteenth Amendment, see *Louis. & Nash. R. R.* v. *Tennessee R. R. Comm.*, 19 Fed. Rep. 679, 691; *Chi. & N. W. Ry.* v. *Railway Comrs.*, 35 Fed. Rep. 866, 876; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Waters-Pierce Oil Co.* v. *Texas* (*No. 1*), 212 U. S. 86, 108.

In the last cited case while the statute was upheld, the correctness of the rule of the above cases was admitted. See also, among cases from the state courts, *Ex parte Jackson*, 45 Arkansas, 158; *Czarra* v. *Board*, 25 App. D. C. 443; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Hewitt* v. *Medical Examiners*, 148 California, 590; *Louis. & Nash. R. R.* v. *Kentucky*, 99 Kentucky, 663; *Commission* v. *Louis. & Nash. R. R.*, 20 Ky. Law, 491; *Mathews* v. *Murphy*, 23 Ky. Law Rep. 750; *Hagerstown* v. *Balt. & Ohio Ry.*, 107 Maryland, 178; *Mayor*

v. *Radecke*, 49 Maryland, 217, 230; *Cook* v. *State*, 26 Ind. App. 278.

It does not matter whether the deprivation of liberty or other fundamental rights result from the arbitrary action of a jury, a judge or any other agency of state government. This court under the mandate of the Fourteenth Amendment, when its authority is properly invoked, must interfere to prevent the wrong. And what can be more arbitrary than the verdict of the jury in this case, finding the defendant guilty of the shadowy and uncertain offense of editing the innocent article in question and thereby tending to create a mental attitude on the part of someone which the jurors would describe as "disrespect" for some law, relating to nude bathing. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Dobbins* v. *Los Angeles*, 195 U. S. 233, 240.

See also *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Patterson* v. *Colorado*, 205 U. S. 454, 461.

Mr. W. V. Tanner, Attorney General of the State of Washington, and *Mr. Fred G. Remann*, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an information for editing printed matter tending to encourage and advocate disrespect for law contrary to a statute of Washington. The statute is as follows: "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross

misdemeanor"; Rem. & Bal. Code, § 2564. The defendant demurred on the ground that the act was unconstitutional. The demurrer was overruled and the defendant was tried and convicted. 71 Washington, 185. With regard to the jurisdiction of this court it should be observed that the Supreme Court of the State while affirming that the Constitution of the United States guarantees freedom of speech, held not only that the act was valid in that respect but also that it was not bad for uncertainty, citing *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, so that we gather that the Constitution of the United States and especially the Fourteenth Amendment was relied upon, apart from the certificate of the Chief Justice to that effect.

The printed matter in question is an article entitled "The Nude and the Prudes" reciting in its earlier part that "Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society"; that "one of the liberties enjoyed by Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose"; but that "eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom," and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. "And the perpetrators of this vile action wonder why they are being boycotted."—It goes on "The well merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy." It then predicts and encourages the boycott of those who thus interfere with the freedom of Home, concluding: "The boycott will be pushed until these invaders will come to see the

brutal mistake of their action and so inform the people." Thus by indirection but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found.

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash* v. *United States*, 229 U. S. 373. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less

selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States.

Judgment affirmed.